86-155

Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Respondent,

v.

EMMET RIGGS,
Petitioner.

ON WRIT OF CERTIORARI TO THE
CONNECTICUT APPELLATE COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(i) Does the existence of a facially valid indictment afford ample assurance that the charges brought against the Defendant were based upon probable cause?

(ii) Was the evidence sufficient to prove the Defendant intended to kill the victim?

(iii) Is it inherently unfair and prejudicial to charge the jury on the crime of murder when there is insufficient evidence to support a conviction?

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No. _____

In The

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OCTOBER TERM, 1986

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ON WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, EMMET RIGGS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Connecticut Appellate Court, made and entered in this proceeding on April 26, 1986. The Connecticut Supreme Court

denied the Defendant's petition for certification to appeal from the Appellate Court on May 28, 1986.

The citation of the Connecticut Appellate Court opinion is *State v. Riggs*, 7 Conn. App. 180 (1986) (Appendix A). The citation of the Connecticut Supreme Court order denying petition for Writ of Certiorari is not yet published (Appendix B).

A. THE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The judgment or decree sought to be reviewed is the opinion of the Connecticut Appellate Court, made and entered April 26, 1986.

(ii) A petition for writ of certiorari was filed in the Connecticut Supreme Court and denied by said Court May 28, 1986.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1).

B. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS.

U.S. Const. Amend V and XIV.

C. STATEMENT OF THE CASE

The following facts are uncontroverted by the evidence. At approximately 11 p.m. on June 19, 1981, Jocelyn Howard, the victim, was sitting with two friends, Rosemarie Smith and Donna Watson, at the upstairs bar of Jerry Mac's Cafe in Hartford. The defendant approached the bar and ordered a drink. The defendant was unknown to the three women. He offered to buy Smith a drink but she refused. Thereafter, the defendant became the object of a verbally abusive and profane attack by the victim who was seated next to Smith. The victim continued to utter profanities at the defendant. She arose from her chair to corner the defendant and pointed towards him. The defendant's claim is that the victim confronted him with an object, either a knife or a razor blade. No object was ever discovered, but none was looked for during the evening in question. The defendant took out his pen knife (which he carried for work) from his jacket and interposed it between himself and the victim. The defendant testified that the victim fell onto his knife. The state claimed that the evidence indicated that the defendant intentionally stabbed the victim. The state's witness testified the knife was held underhand in front of the victim (the position reasonably to be assumed in a self defense posture). The knife entered the victim's upper chest severing the aorta. The defendant pulled back the knife from the victim's body and left the cafe. The victim died several hours later.

The defendant testified that the next day he learned from his brother that someone had died from a stab wound at the cafe. The police had no suspect and the defendant, a local resident, was not being sought for questioning. Nevertheless, upon the advice of counsel, he gave the police a statement, without counsel present, detailing his encounter with the victim.

The defendant was immediately arrested and subsequently indicted by a grand jury for murder, a violation of Connecticut General Statutes § 53a-54a. The defendant objected to the grand jury indictment procedure.

The defendant also moved for judgment of acquittal on the charge of murder on the ground that the evidence was insufficient to prove he intended to kill the victim. The defendant's objections were overruled and the case was tried before a jury. The defendant was found guilty of the "lesser-included" offense of manslaughter in the second degree, a violation of Conn. Gen. Stat. § 53a-56.

The defendant appealed from the judgment of conviction to the Appellate Court on the grounds: (1) that the state's attorney's decision to prosecute for murder, when the state could reasonably expect to prove only a lesser included offense, was an abuse of prosecutorial discretion; and (2) that the trial court erred in denying the defendant's motions for judgment of acquittal on the charge of murder. The Appellate court found no error and held: (1) that the existence of a facially valid indictment afforded ample assurance that the charges brought against the defendant were based upon probable cause; and (2) that there was sufficient evidence from which the jury could have reasonably found that the defendant intended to cause the victim's death. The Appellate Court further stated that even if it was error for the trial court to deny the defendant's motions for judgment of acquittal on the murder charge, it was harmless error because the jury impliedly acquitted the defendant of murder when he was found guilty of manslaughter in the second degree.

POINT I. THE EXISTENCE OF A FACIALLY VALID INDICTMENT DOES NOT AFFORD AMPLE ASSURANCE THAT THE CHARGES BROUGHT AGAINST THE DEFENDANT WERE BASED UPON PROBABLE CAUSE.

The existence of a facially valid indictment without a meaningful probable cause hearing does not demonstrate the existence of probable cause. The evidence presented to the grand jury is limited and one-sided. The defendant has no right to have an attorney present, to call other witnesses or cross-examine the state's witnesses. An indictment returned after such a hearing is nothing more than a rubber-stamp of the

State's Attorney's request for an indictment. Facts sufficient to support an indictment might easily be extinguished upon a defense attorney's cross examination of the state's witnesses, thereby nullifying the grounds for returning an indictment. The same might occur with the proper presentation of other witnesses.

An indictment is nothing other than a hurdle strategically placed to sap the defendant's energy early on and thereby ensure insufficient reserve to complete the full race.

POINT II. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE DEFENDANT INTENDED TO KILL THE VICTIM.

The evidence in this case is not sufficient to support the conclusion that the defendant acted with intent to kill. The four facts listed by the Appellate Court do not preclude the hypothesis that the victim's death was accidental or at least not intended. The Appellate Court in fact characterizes the incident as an "accident" although that may be a typographical error, *see* 7 Conn. App. at 187. The fact that the knife entered a vital area of the body was fortuitous. The downward angle of the penetration is consistent with the victim falling into the knife. Finally, the defendant did not flee from the scene. The defendant left the bar and went home because he was not informed of the seriousness of the victim's wounds or told to remain in the cafe after the incident occurred.

The state's witnesses support the defendant's testimony that he merely held the knife in front of him and had no intent to use it, much less kill with it. The defendant's casual manner in leaving the cafe cannot be characterized as fleeing, especially because no one chased him. All of the defendant's actions actually preclude proof beyond a reasonable doubt of intent to kill.

"A conclusion of guilt requires proof beyond a reasonable doubt, and proof to that extent is proof which precludes every reasonable hypothesis except that which it tends to support and is consistent with the defendant's guilt and inconsistent with any other rational conclusion. *State v. Foord*, 142 Conn. 285, 295, 113 A.2d 591 (1955); *State v. Kelsey*, 160 Conn. 551, 553, 274 A.2d 151 (1970); *State v. Reid*, 154 Conn. 37, 40, 221 A.2d 258 (1966); *State v. Annunziato*, 145 Conn. 124, 136, 139 A.2d 612 (1958)." *State v. Payne*, 186 Conn. 179, _____, 440 A.2d 280, 282 (1982). The evidence in the present case does not reasonably exclude the hypothesis that the defendant did not act with intent to kill. The Trial Court erred in denying the defendant's motions for judgment of acquittal on the charge of murder.

POINT III. IT IS INHERENTLY UNFAIR AND PREJUDICIAL TO CHARGE THE JURY ON THE CRIME OF MURDER WHEN THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION.

The Appellate Court held that because the jury found the defendant not guilty of murder he was not prejudiced by the lack of evidence to support a murder conviction. It is the defendant's position that it is inherently unfair to charge him with murder when there is insufficient evidence to convict him of murder. The impact upon the minds of a jury may be to shift the burden of proof on the element of intent to the defendant. Shifting the burden of proof of an essential element to the defendant denies him the protection of due process of law. *Patterson v. New York*, 433 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); and *In re Winship*, 397 U.S. 358, 364 (1970). Certainly to charge the defendant with murder at least suggests to the jury that the state believes that a murder was committed which must adversely affect the jury's evaluation of the facts presented at trial.

The defendant had a right to be charged with and tried for only the crimes for which there was sufficient evidence to support a conviction. The jury's acquittal of the defendant on the charge of murder does not cure the Trial Court's error in denying the defendant's motions for judgment of acquittal of the murder charge. Had the jury no murder charge to consider, its view of the lesser non-intentional homicides might easily have been more favorable to the defendant. The defendant should be retried on the charge of manslaughter in the second degree, Conn. Gen. Stat. § 53a-56.

CONCLUSION

The decision in this case sets forth a disturbing novel doctrine of allowing the State to prosecute an individual for murder when a fair analysis of the evidence is insufficient to prove the necessary element of intent to kill. The existence of a facially valid indictment in the State of Connecticut does not provide assurance that the charges brought against the defendant were based upon probable cause. Charging the jury on the crime of murder when there is insufficient evidence to support a conviction is inherently unfair and violates the defendant's right to due process of law when the Court is also permitted to charge on lesser homicides.

Dated: July 21, 1986.

Respectfully submitted,

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APPENDIX A

OPINION OF THE CONNECTICUT APPELLATE COURT FILED APRIL 22, 1986

STATE OF CONNECTICUT *v.* EMMET RIGGS
(2780)

DUPONT, C. J., HULL and DALY, Js.

The defendant was indicted by a grand jury on a charge of murder and, after a jury trial, was found guilty of the lesser included offense of manslaughter in the second degree. On appeal from the judgment of conviction, he claimed that the decision by the state's attorney to prosecute

him for murder constituted an abuse of prosecutorial discretion. He further claimed that the trial court erred in denying his motions for judgment of acquittal filed on the ground of insufficient evidence. *Held:*

1. The existence of a facially valid indictment afforded ample assurance that there was probable cause to support the murder charge, and there was no evidence that the indictment was improper on its face or that the grand jury was biased.
2. The trial court did not err in denying the motions for judgment of acquittal since there was sufficient evidence from which the jury could have found the defendant guilty of murder.

Argued February 6—decision released April 22, 1986

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the jury before *E. O'Connell, J.;* verdict and judgment of guilty of manslaughter in the second degree, from which the defendant appealed to this court. *No error.*

Nicholas P. Cardwell, with whom was *Kenneth J. McDonnell,* for the appellant (defendant).

Susan C. Marks, deputy assistant state's attorney, with whom, on the brief, was *Warren Maxwell,* assistant state's attorney, for the appellee (state).

DALY, J. The defendant was indicted by a grand jury for murder, a violation of General Statutes § 53a-54a. The case was tried before a jury and the defendant was found guilty of the lesser included offense of manslaughter in the second degree, a violation of General Statutes § 53a-56. The defendant appeals from the judgment of conviction alleging that he was denied the protection of the presumption of innocence and due process of law (1) because the decision of the state's attorney to seek an indictment for murder was not reasonably supported by the evidence and (2) because the trial court denied his motions for judgment of acquittal and charged the jury on the elements of every

lesser included offense to the original charge of murder where the evidence was insufficient to substantiate the original charge. We find no error.

The following facts are undisputed. At approximately 11 p.m. on June 19, 1981, Jocelyn Howard, the victim, was sitting with two friends, Rosemarie Smith and Donna Watson, at the upstairs bar of Jerry Mac's Cafe in Hartford. The defendant approached the bar and ordered a drink. The defendant was unknown to the three women. He offered to buy Smith a drink but she refused. Thereafter, the defendant became engaged in a heated argument with the victim who was seated next to Smith. The victim uttered profanities at the defendant. She arose from her chair to block the defendant's way and pointed towards him. The defendant claims that the victim confronted him with an object, either a knife or a razor blade. No other eyewitness saw such an object nor was one ever discovered. The defendant drew a knife from his jacket and interposed it between himself and the victim. The defendant claims that the victim fell onto his knife. The state claims that the evidence indicates that the defendant intentionally stabbed the victim. The knife entered the victim's upper chest severing the aorta. The defendant withdrew the knife from the victim's body, placed it back in his jacket and left the cafe. The victim died several hours later.

The next day, the defendant claimed that he learned that someone had died from a stab wound at the cafe. Soon thereafter and upon the advice of counsel, he gave the police a statement detailing his confrontation with the victim. The defendant was subsequently arrested and indicted by a grand jury for murder.

At the close of the prosecution's case, the defendant moved for a judgment of acquittal on the charge of murder. General Statutes § 53a-54a (a) provides in pertinent part: "A person is guilty of murder when,

with intent to cause the death of another person, he causes the death of such person . . . . " "A person acts 'intentionally' with respect to a result . . . described by a statute defining an offense when his conscious objective is to cause such result . . . . " General Statutes § 53a-3 (11). The defendant alleged that the state had failed to present evidence to prove that the defendant intended to cause the victim's death. This motion was denied. After the presentation of the defendant's case, he again moved for a judgment of acquittal on the same ground. This motion was also denied. The jury was charged as to the elements of murder, as well as the lesser included offenses of manslaughter in the first degree, manslaughter in the the second degree and criminally negligent homicide. The jury found the defendant guilty of manslaughter in the second degree. See General Statutes § 53a-56.[1] After the jury rendered its verdict, the defendant made a final written motion for judgment of acquittal. This motion was denied without articulation.

The defendant's first argument is that the decision of the state's attorney to prosecute the defendant for murder constituted an abuse of prosecutorial discretion.[2] He alleges that the prosecutor possessed insuffi-

[1] "A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person . . . . " General Statutes § 53a-56 (a). "A person acts 'recklessly' with respect to a result . . . described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur . . . . The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . ." General Statutes § 53a-3 (13).

[2] The defendant's brief alleges that he was denied the presumption of innocence. The presumption of innocence refers to the assignment of the burden of proof, beyond a reasonable doubt, which the state must bear to prove every element of a criminal charge. See *State* v. *Fernandez*, 198 Conn. 1, 21, 501 A.2d 1195 (1985); McCormick, Evidence (2d Ed., 1972) § 342. The trial court's jury instruction specified that the state bore the burden

cient evidence to demonstrate that the defendant intended to cause the victim's death as provided by General Statutes § 53a-54a. See General Statutes § 53a-3 (11). The state argues that no such claim was presented to the trial court and therefore is not a proper issue for appellate review. See *State* v. *Miller,* 186 Conn. 654, 658–59, 443 A.2d 906 (1982); *State* v. *Narvaez,* 3 Conn. App. 166, 168–69, 485 A.2d 1351 (1985). The state's argument continues, however, alleging that the existence of a grand jury indictment on the murder charge belies the defendant's allegation that the state's attorney abused his discretion.

The Appellate Court may only review those issues which were properly raised and ruled on by the trial court. *State* v. *Miller,* supra, 658. In general, a claim of an abuse of prosecutorial discretion should be made by a motion to dismiss based upon the "insufficiency of evidence or cause to justify the bringing or continuing of such information or indictment or the placing of the defendant on trial . . . ." Practice Book § 815 (5); see Spinella, Connecticut Criminal Procedure, pp. 604–605. Practice Book § 816, however, prohibits a "defendant who has been indicted by a grand jury . . . [to] make a motion under [Practice Book § 815 (5)]." The defendant made no formal objection to the prosecutor's actions charging the defendant with murder. He did challenge the sufficiency of the evidence of intent in his motions for judgment of acquittal but such challenge did not refer to an abuse of prosecutorial discretion. Nevertheless, because the defendant's claim raises an issue of his constitutional right to due process, we shall review his claim to the extent that it is clearly established on the record. *State* v. *Orsini,* 187 Conn. 264, 271, 445 A.2d 887, cert. denied, 459 U.S. 861, 103 S. Ct. 136, 74 L. Ed. 2d 116 (1982).

of proving intent. The record does not show that the state was excused from its burden of proving intent, or any other element of the crimes charged.

The due process clause of the fifth amendment to the United States constitution protects against vindictive or coercive use of the federal prosecutorial power. *United States* v. *Goodwin,* 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). The fourteenth amendment protects persons from the state's abuse of its prosecutorial power. See *State* v. *Hayes,* 127 Conn. 543, 581, 18 A.2d 895 (1941). Additionally, "the inherent supervisory powers of the court over legal process in this state" guard against unfounded prosecution. *State* v. *Ellis,* 197 Conn. 436, 478, 497 A.2d 974 (1985). The state's attorney is given " 'broad discretion in determining what crime or crimes to charge in any particular situation.' *State* v. *Chetcuti,* 173 Conn. 165, 168, 377 A.2d 263 (1977)." *State* v. *Ellis,* supra, 478. "That power, however, is limited in the usual and lawful manner by the facts which the prosecutor may be reasonably expected to prove at trial. *People* v. *Eboli,* 34 N.Y.2d 281, [357 N.Y.S.2d 435,] 313 N.E.2d 746 [1974]." *State* v. *Darden,* 171 Conn. 677, 682, 372 A.2d 99 (1976). "[A]n indictment returned by a legally constituted nonbiased grand jury . . . if valid on its face . . . satisfies the requirements of the Fifth Amendment." *Lawn* v. *United States,* 355 U.S. 339, 349, 78 S. Ct. 311, 2 L. Ed. 2d 32, reh. denied, 355 U.S. 967, 78 S. Ct. 529, 2 L. Ed. 2d 542 (1958). " 'The basic purpose of . . . indictment by a grand jury is to interpose, between the state and one accused of a crime . . . a body of eighteen disinterested persons . . . to determine whether the state has shown probable cause for subjecting the accused to the expense, embarrassment and risk of such a trial." *State* v. *Merrillo,* 159 Conn. 264, 275, 268 A.2d 667 (1970)." *State* v. *Curcio,* 191 Conn. 27, 33, 463 A.2d 566 (1983). The existence of a facially valid indictment affords ample assurance that the charges brought against the defendant were based upon probable cause. See *State* v. *Curcio,*

supra, 33; *State* v. *Cobbs*, 164 Conn. 402, 406, 324 A.2d 234, cert. denied, 414 U.S. 861, 94 S. Ct. 77, 38 L. Ed. 2d 112 (1973). The record before us provides no evidence demonstrating that the indictment was improper on its face or that the grand jury was biased, nor does the defendant make such a claim.[3]

The defendant's second allegation suggests that the trial court erred in denying his motions for judgment of acquittal on the charge of murder because there was insufficient evidence to support a jury verdict of guilty on such a charge. The defendant made three motions for judgment of acquittal. All three motions were denied without articulation. The defendant's basis for making all three motions was the insufficiency of evidence to prove the charge of murder, specifically that the defendant intended to cause the victim's death.

In denying the defendant's motions for judgment of acquittal, the trial court must have found that " 'the jury could have reasonably concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt.' " *State* v. *Stepney*, 191 Conn. 233, 255, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 772, reh. denied, 466 U.S. 954, 104 S. Ct. 2163, 80 L. Ed. 2d 547 (1984), quoting *State* v. *Nemeth*, 182 Conn. 403, 410, 438 A.2d 120 (1980). Our review of the record discloses sufficient evidence from which the jury could rea-

[3] The defendant does not claim that his right to due process was violated because the prosecutor's decision was motivated by vindictiveness. See *United States* v. *Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). There is no claim that the prosecutor's decision denied the defendant's right to equal protection. See *State* v. *Haskins*, 188 Conn. 432, 474, 450 A.2d 828 (1982).

The defendant does not assert that the due process clause of the Connecticut constitution, article first, § 8, affords a defendant any greater protection from prosecutorial discretion than that afforded by the fourteenth amendment to the United States constitution.

sonably have found beyond a reasonable doubt that the defendant intended to cause the victim's death. There was evidence that the defendant and the victim were arguing immediately prior to the accident. There was also evidence that the knife entered a vital area of the body. The knife also penetrated the victim's body at a downward angle, to a depth of approximately five inches. The defendant fled from the scene of the incident. From such evidence the jury could have reasonably found that the defendant intended to cause the victim's death.

If we assume, arguendo, that the jury should not have been charged on the crime of murder, the defendant was not prejudiced by such alleged error. The jury impliedly acquitted the defendant of murder and found him guilty of the lesser included offense of manslaughter in the second degree.[4] *State* v. *Shipman,* 195 Conn. 160, 162, 486 A.2d 1130 (1985). If any error was made, with respect to the charge of murder, it was harmless beyond a reasonable doubt. *State* v. *Cohane,* 193 Conn. 474, 484, 479 A.2d 763, cert. denied, U.S. , 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984).

There is no error.

In this opinion the other judges concurred.

[4] Because we find that there was sufficient evidence of intent to warrant submission of a charge of murder to the jury, we need not speculate as to whether it was proper to instruct the jury on the lesser included offenses of manslaughter in the first and second degree and criminally negligent homicide. Such an instruction was proper. See General Statutes § 53a-45 (c); *State* v. *Rodriguez,* 180 Conn. 382, 399-405, 429 A.2d 919 (1980).

APPENDIX B

ORDER OF THE CONNECTICUT SUPREME COURT DATED MAY 28, 1986

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-85-1127

State of Connecticut

v.

Emmet Riggs

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (7 Conn. App. 180) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

/s/ Cynthia M. Gworek
Assistant Clerk-Appellate

Dated: May 28, 1986

Notice to: 5/28/86
Clerk, Superior Court, Hartford-47727
Clerk, Appellate Court
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John M. Bailey, S.A. Susan Marks, D.A.S.A.
Warren Maxwell, A.S.A.
James G. Clark, D.A.S.A.
Susan E. Gill, D.A.S.A.

Nicholas P. Cardwell in support of petition—*Susan C. Marks* in opposition.